# Supreme Court of the United States

October Term, 1966

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# Supreme Court of the United States

October Term, 1960

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MAX MILLET and DORA MILLET,

*Petitioners,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Petitioners, Max Millet and Dora Millet, pray that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit entered March 23, 1961, affirming the decision and judgment of the United States District Court for the Eastern District of New York which dismissed the complaint of the petitioners for failure to state a claim.

### Opinions Below

The opinion of the Court of Appeals, made a part of the appendix to this petition, is not yet reported officially.

The opinion of the District Court is reported in 189 F. Supp. 88.

## Jurisdiction

Judgment, dated March 23, 1961, was entered in the United States Court of Appeals for the Second Circuit on March 23, 1961.

Jurisdiction to review the Judgment by Writ of Certiorari is found in 28 U. S. C. A. 1254(1), 28 U. S. C. A. 2101 (c) and Rule 19(1b) of the Rules of this Court under this Court's power of supervision over the Federal Judicial System, and more particularly that the United States Court of Appeals for the Second Circuit (1) has decided an important question of federal law which has not been, but should be, settled by this Court and also (2) has decided a federal question in a way in conflict with applicable decisions of this Court; and (3) has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

The jurisdictional basis of the District Court is founded on the Tucker Act, 28 U. S. C. A. 1346(a)(2), Quiet Title Statute, 28 U. S. C. A. 2410, Postal Service Statute, 28 U. S. C. A. 1339 and Due Process provision, 5th Amendment, United States Constitution.

## Questions Presented

Petitioners respectfully pray that a Writ of Certiorari be granted and that this Honorable Court summarily reverse the court below. Questions presented for review are:

### I

Did the Postmaster General have authority, under the Post Office Department Financial Control Act of 1950, 64 Stat. 462, Sec. 8(1), to enter into an agreement with the

owner of real property (1) to erect a post office building for the Post Office Department on that property and (2) to lease the building from the owner for a 20-year term for Post Office Department use on completion of the building, in view of the Public Contracts Act of 1906, 34 Stat. 255, 41 U. S. C. 11 (1958), which prohibits any government contract unless authorized by statute?

II

Did the Court of Appeals and the District Court depart from judicial principle and violate the well-established rule of this Court enunciated in *Chase* v. *United States*, 155 U. S. 489, voiding post office leases *ab initio* when not made in compliance with Public Contracts Act of 1906, 34 Stat. 255, 41 U. S. C. 11 (1958)?

III

Did the Court of Appeals and the District Court depart from judicial principle and violate the well-established rule of this Court enunciated in *Guerini Stone Co.* v. *P. J. Carlin Co.*, 240 U. S. 264, relating to construction of contracts by reference, annexation and merger of contract instruments in ignoring the existence of the January 1953 build-and-lease agreement and deciding this case only on the basis of the January 1954 lease instrument made pursuant to the January 1953 agreement in issue?

## The Statutes

The statutes which the case involves are set forth:

1. Public Contracts Act of 1906, 34 Stat. 255, 41 U. S. C. 11 (1958).

> "No contract or purchase on behalf of the United States shall be made, unless the same is authorized by

law or is under an appropriation adequate to its fulfillment, except in the Departments of the Army, Navy and Air Force, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year."

2. Post Office Department Financial Control Act of 1950, 64 Stat. 462, Sec. 8.

"In the performance of, and with respect to, the functions, powers, and duties vested in him, the Postmaster General may—"

(1) enter into such leases of real property as may be necessary in the conduct of the affairs of the Department on such terms as he may deem appropriate, without regard to the provisions of any law, except those provisions of law specifically applicable to the Department;

(2) • • •;

(3) • • •."

3. Post Office Department Property Act of 1954, 68 Stat. 523, Sec. 203(a).

"The Postmaster General is authorized to—

(1) negotiate and enter into lease agreements with any person, copartnership, corporation, or other public or private entity, which do not bind the government for periods exceeding thirty years for each such lease agreement, on such terms as the Postmaster General deems to be in the best interests of the United States, for the erection by such lessor of such buildings and improvements for postal purposes as the Postmaster General deems appropriate, on such lands sold, leased

or otherwise disposed of by the Postmaster General to, or otherwise acquired by, such person, copartnership, corporation, or public or private entity;

(2) • • •.

203(b) • • •."

## Statement of the Case

In January 1953, the subject premises was a vacant parcel of land owned by Cohanan Realty Corp. That lessor at that time entered into a construction and leasing agreement with the Post Office Department for erection of a permanent-type structure on that parcel for postal purposes in accordance with Post Office Department specifications and requirements and on completion for the execution of a lease instrument for 20-year term.

The agreement stipulated the specifications of the structure to be erected and the rental, duration of the term (20 years), terms and conditions of the lease were stated in the agreement, and the standard form of Post Office Department lease attached to the agreement.

In January 1954, on completion of the building, the previously agreed to lease instrument was executed between the Post Office Department and the five individuals on the lease instrument as successors in interest to Cohanan Realty Corp. for 20-year term.

This is indicated in Provision 13 of the lease instrument which states that it is made pursuant to the January 1953 construction and leasing agreement.

In April 1955 petitioners became the owners of the subject property and are presently the owners thereof.

In July 1960, quiet title suit was instituted to annul the lease instrument as void and invalid and to remove it from

the records against the property. The complaint alleged that the January 1953 build-and-lease agreement for 20-year term and the January 1954 20-year term lease instrument made pursuant to the January 1953 agreement are void and invalid because in violation of 41 U. S. C. 11 (1958) which prohibits such agreements unless authorized by law. That the subject contract was first authorized by the Post Office Department Property Act of 1954 on July 22, 1954 under 68 Stat. 523, Sec. 203(a)(1).

That the existence of a void and invalid lease made without authority of law and filed against the property of the petitioners violates their property rights without due process under the Fifth Amendment of the United States Constitution.

## Reasons for allowance of the writ and for summary reversal

### POINT I

**Post Office Department Financial Control Act of 1950, 64 Stat. 462, Sec. 8(1), does not authorize erection of post office buildings and 20-year leases on such buildings. It is merely a Congressional authorization to the Postmaster General to waive the general statutes governing government leases as applied to the Post Office Department.**

From a reading of the 1950 statute, it is clear that the words of the statute do not speak of authority to the Postmaster General to enter into an agreement with the owner of real property for such owner to build a post office on his property for the Post Office Department in accordance with Post Office Department specifications and requirements, and on completion to execute a 20-year lease on the newly

erected building for Post Office Department use. This was done under a later statute of July 22, 1954 Post Office Department Property Act, 68 Stat. 523, Sec. 203(a)(1).

Comparison of the words and purpose of the two statutes and the legislative history shows clearly that the decision of both courts below was in error. Neither the erection of new Post Office buildings nor 20-year leases is authorized under this statute, 64 Stat. 462, Sec. 8(1).

For comparison see 39 U. S. C., Secs. 2102, 2103 as to duration of term of lease on build-and-lease agreements reported in U. S. Code Congressional and Administrative News, 86th Congress, 2nd Session, 1960, Vol. 1, Page 675.

The legislative history of the 1950 statute indicates that the Postmaster General desired only authority to waive the general statutes regarding advertising, competitive bids and other requirements in order to be free to negotiate directly with chosen lessors selected by the Post Office Department. Elimination of these requirements would result in improved financial and accounting procedures in accordance with the 1950 statute enacted for that purpose.

U. S. Code Congressional Service, 81st Congress, 2nd Session, 1950, Vol. 2, Page 3024:

"The proposed legislation will modernize and improve the accounting and auditing of the Post Office Department and implement the Department's new budget procedure. To implement the necessary changes in functions and procedures and to give needed freedom of action to the Department, the bill provides the following: * * * (11) Removes certain restrictions with regard to leases of real property; and (12) * * *."

Page 3028: "Section-by-Section Analysis. * * * Section 8. Leases, donations, and rewards. This section gives the Postmaster General additional authority and freedom of

action with respect to the leases of real property. • • • With respect to the authority in this section concerning leases, the Postmaster General is authorized to enter into leases of real property necessary in the conduct of the Department's affairs, without regard to the provisions of laws other than those specifically applicable to the Department. General provisions of law regulating the rent payable under Government leases, general provisions requiring advertising, etc., will not apply to such transactions. It is recognized that post offices must be located to meet the needs of the public, the handling of the mail matter, and to permit economical operations of the Department, *and that the statutes waived* give rise to frequent difficulties in this respect." (Emphasis added.)

The following excerpts of testimony on the subject legislation further reinforce and support this view.

Page 74:

*"That, taken together with the provisions of section (3a), which permits the Postmaster General, notwithstanding the provisions of any other law, to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of the affairs of the Department, and on such terms as he may deem appropriate, would permit the Postmaster General to waive any and all provisions of law heretofore enacted with respect to the Government generally or with respect to the Post Office Department, telling it how it should enter into its contracts, telling it how it should make its disbursements.*

*All of these could be waived if the Postmaster General determined that—it was in the performance of and with respect to the functions, powers, and duties vested by law in him or any other officer in or under the Post Office Department."* (Emphasis added.)

Page 85:

"• • • *I think the Postmaster General comes in this morning and agrees that he is asking for authority to waive these numerous statutes which have been enacted from time to time by Congress to tell the Department how it is to spend its money; in other words, whether it has to advertise, and so forth.* • • • (Emphasis added.)

We feel, in any event it would be much better to legislate specifically with reference to the Post Office Department, to give them the freedom they need on their leases • • •."

Bills To Implement Recommendations Of The Commission On Organization Of The Executive Branch Of The Government (The Hoover Commission),

Hearings before the Committee on Post Office and Civil Service, United States Senate, Eighty-first Congress, 1st and 2nd Sessions,

On S. 2027, S. 2062, S. 2111, S. 2212, S. 2213, S. 2509, S. 3829 and S. 3830, July 20, 27, 1949 and March 1, 14, 21, June 29, July 18, 27 and August 7, 1950.

The Post Office Department Financial Control Act of 1950 is a statute, as stated in the purpose of the act, for the improvement of Post Office Department accounting methods and procedures.

Section 8(1) of the statute, 64 Stat. 462, is clearly a Congressional authorization to the Postmaster General (for the improvement of accounting procedures) to waive existing general statutes on Government leases and their requirements when in the exercise of his duties and authority he does enter into leases of real property based on Title 39, U. S. C., Postal Service Act or some other specific law

for postal purposes (See supra, page 74—"All of these could be waived etc.").

The section itself, being only a waiver of the general laws, does not authorize build-and-lease agreements for 20-year term as claimed by the Government. This was not even claimed at the time of enactment, by the Postmaster General, the Comptroller General of the United States, the Director of the Bureau of the Budget or the Secretary of the Treasury. See the letter reports of these officials on Pages 3030-3034 of 1950 U. S. Code Congressional Service.

The legislative history of the act, reported in 1950 U. S. Code Congressional Service, Pages 3022-3034, or Senate Report No. 2217, August 1, 1950; House Report No. 2339, June 26, 1950, does not support the claim of the Government or the decision of the courts below.

The decisions made no ruling on the January 1953 build-and-lease agreement. It ruled only on the basis of the January 1954 lease instrument.

The error of the decisions of the courts below is that the Post Office Department Financial Control Act of 1950, 64 Stat. 462, Sec. 8(1), does not authorize build-and-lease agreements for 20-year term.

If the 1950 Post Office Department Financial Control Act, 64 Stat. 462, Sec. 8(1), authorizes the same build-and-lease agreements for 20-year term as does the 1954 Post Office Department Property Act, 68 Stat. 523, Sec. 203(a)(1), then there is no purpose in the 1954 legislation.

If the 1950 Act allows build-and-lease agreements for 20-year term, then it can also be interpreted to permit build-and-lease-purchase agreements for 20-year term or any agreement or term of years.

The decisions of the courts below gave unlimited meaning to the words of Section 8(1), supra, " • • •, the Postmaster General may—(1) enter into such leases of real property as may be necessary in the conduct of the affairs of the Department on such terms as he may deem appropriate • • •" (• • • indicates eliminated wording). Reading out of the statute wording enacted into the statute is, of course, error in construction.

This is not normal construction of the words of the statute, but runaway interpretation limited only by the imagination of the Postmaster General and the Post Office Department.

## POINT II

**Build-and-lease agreements for 20-year term were first authorized under the July 1954 Post Office Department Property Act, 68 Stat. 523, Sec. 203(a)(1) expressly enacted for that purpose.**

Before July 22, 1954 and particularly in January 1953 and January 1954 there was no statutory authority in the Postmaster General to enter into build-and-lease agreements for postal purposes for 20-year term.

Such agreements were first authorized to the Postmaster General under the July 1954 Post Office Property Act, 68 Stat. 523, Sec. 203(a)(1).

The legislative history of this statute supports this view. The Postmaster General in requesting this authority indicated build-and-lease agreements for 20-year term were not authorized at that time. The letter is set forth in part.

Page 2646, 1954 U. S. Code Congressional and Administrative News:

"Post Office Department
Office of the Postmaster General
Washington 25, D. C., July 17, 1953.

Hon. George A. Dondero
Chairman, Committee on Public Works
House of Representatives.

Dear Mr. Chairman:

Reference is made to your request for a report on H. R. 6342, a Bill to Amend the Public Buildings Act of 1949 to authorize * * * to extend the authority of the Postmaster General to lease quarters for Post Office purposes; and for other purposes.

The provisions contained in this measure are the result of extended study and discussion between representatives of the General Services Administration, the General Accounting Office, Bureau of the Budget and the Post Office Department. This measure has grown out of recommendations made from many viewpoints.

* * *

Title II of the bill relates to the Post Office Department.

*The purpose and intent of this title is to authorize the Postmaster General to enter into two types of lease-holds (lease-purchase and term-lease agreements), not presently permissive, in the procurement of space to be used exclusively by the Post Office Department.* (Emphasis added.)

* * *

Sincerely yours,

/s/ Arthur E. Summerfield
Postmaster General."

The courts below erred in holding that prior to July 1954 statute (Post Office Department Property Act), the Postmaster General had authority under the 1950 statute (Post Office Department Financial Control Act) to enter into build-and-lease agreements for 20-year term.

The construction given by the courts below was never claimed by the Postmaster General or other agency officials. The 1954 statute was enacted at the request of the Post Office Department to provide authorization to enter into build-and-lease agreements for 20-year term not previously authorized under any existing statute until first authorized by the July 1954 statute.

## POINT III

**Under the rule of *Chase v. United States*, 155 U. S. 489, the build-and-lease agreement of January 1953 and the January 1954 lease instrument for 20-year term made pursuant to the January 1953 agreement are void and invalid and violate the Public Contracts Act of 1906, 34 Stat. 255, 41 U. S. C. 11 (1958).**

The Public Contracts Act of 1906, 41 U. S. C. 11 (1958) prohibits any government contract not authorized by law. Such contracts are void and invalid ab initio. See *Chase* v. *United States*, C. C. Ind. 1890, 44 Fed. 732, aff'd 155 U. S. 489.

It is only necessary to point out that under the above decision of the United States Supreme Court, under substantially similar facts as the subject case, the lease was voided after 16 years.

The rule was established in that case that the contract must be expressly authorized by the statute or be sanctioned by necessary implication. Otherwise, it was void ab initio and violated the requirement of the Public Contracts Act.

It was held that the statutory power to establish post offices necessarily implied authority to disestablish them. But it could not be construed impliedly to give authority to build and lease post offices for 20-year term.

Similarly, 64 Stat. 462 Sec. 8(1), Post Office Department Financial Control Act 1950, could not be construed to authorize build-and-lease agreements for 20-year term because the statute did not expressly authorize it and it is not necessarily implicit in the wording of the statute.

The courts below were in error in departing from the well-established authority of *Chase* v. *United States, supra.*

## POINT IV

**Under the rule of *Guerini Stone Co.* v. *P. J. Carlin Co.*, 240 U. S. 264, the build-and-lease agreement of January 1953 and the lease instrument of January 1954 were one contract and the courts below were in error in treating them as separate and independent agreements.**

The 1953 build-and-lease agreement stipulated the specifications of the structure to be erected and the rental, duration of the term, terms and conditions of the lease were stated in the agreement and the standard form of Post Office Department lease attached to the agreement.

The agreement reads in part:

"The undersigned hereby agrees to lease the premises described below for a term of twenty (20) years from September 1, 1953, or date thereafter of completion of building or any contemplated improvement, * * * and subject to the provisions of the form of lease used by the Post Office Department, and the Information for Proponents, specimens of which are annexed hereto, and which have been carefully

read by the undersigned, except that clauses A and B of Par. 10 shall be eliminated": (there follows a description of the dimensions of the building and specifications of the yard and driveway which were to be erected on the vacant parcel and some additional requirements to be furnished under the lease). It is executed by Cohanan Realty Corp. the original contractor and lessor, and accepted by the Post Office Department.

The leasing agreement is part of the construction agreement. In fact, they are one contract and cannot be separated.

It is evident that without the construction of a new permanent-type structure according to Post Office Department specifications and requirements, there cannot be a leasing agreement on completion.

The 1954 lease instrument states in Provision 13 that it is made pursuant to the 1953 construction and leasing agreement.

The 1954 lease instrument recites the same terms and conditions as the standard form Post Office Department lease attached to the 1953 construction and leasing agreement and by the express terms of that contract is "annexed" thereto. The 1954 lease instrument is a shadow agreement and alter ego made "pursuant to" the 1953 agreement.

Under the well-established doctrine of reference, annexation and merger, the 1953 and 1954 agreement are one distinct contract which cannot be separated for any purpose of construction. See *Guerini Stone Co.* v. *P. J. Carlin Co.*, 240 U. S. 264; *Hill and Combs* v. *First National Bank of San Angelo, Texas,* 139 F. 2d 740, 742 (CCA 5, 1944) citing *Guerini Stone Co.* v. *P. J. Carlin Co., supra; Shanks* v. *Wilson,* 86 F. Supp. 789 (D. C. W. Va. 1949); *Raeuber* v. *Central Nat. Bank,* 112 F. Supp. 865 (D. C. Ohio 1953), page 868:

"It is fundamental that a contract may refer to other writings and by adoption make them a part of the contract. 17 C. J. S., Contracts, Sec. 299, P. 716; 12 Am. Jur. 781. Where extrinsic writings are adopted they become a part of the contract or other written instrument by reference. Physical integration of the writings is not required."

The contract is one entire whole and the separation into a leasing and construction agreement for the purpose of supposed compliance with any statute, authorizing the Postmaster General to enter into leasing agreements for space (already in existence) would be an illegal evasion of the Public Contracts Act of 1906 prohibiting contracts not authorized by law.

In January 1953 and January 1954 there was no law in existence to comply with the Public Contracts Act of 1906, 41 U. S. C. 11 (1958). Construction and leasing agreements were first authorized by July 22, 1954 under the Post Office Department Property Act of 1954, 68 Stat. 523, Sec. 203(a)(1).

## CONCLUSION

1. The question should be reviewed by this Court. It has never been decided by this Court whether the 1950 Post Office Department Financial Control Act, 64 Stat. 462, Sec. 8(1) authorizes the Postmaster General to enter into an agreement with the owner of real property for such owner to build a post office on the property and on completion to lease the building to the Post Office Department for 20-year term.

2. The question whether the courts below departed from the rule of *Chase* v. *United States*, 155 U. S. 489, in violation of judicial principle should be reviewed by this Court.

The decision of this Court in *Chase* v. *United States, supra,* a case substantially similar to the subject case, indicates that the Court of Appeals and the District Court below were in error in holding that the 1950 statute, Post Office Department Financial Control Act, 64 Stat. 462, Sec. 8(1), authorized build-and-lease agreements for 20-year term where the statute did not expressly or by necessary implication authorize such agreements.

3. The question whether the courts below departed from the rule of *Guerini Stone Co.* v. *P. J. Carlin Co.,* 240 U. S. 264, in violation of judicial principle should be reviewed by this Court. The decision of this Court in *Guerini Stone Co.* v. *P. J. Carlin Co., supra,* indicates that the Court of Appeals and the District Court below were in error in treating the January 1953 build-and-lease agreement for 20-year term and the January 1954 20-year lease instrument as separate and independent contracts.

For the foregoing reasons, petitioners respectfully pray that a Writ of Certiorari be granted and that this Honorable Court summarily reverse the courts below.

Respectfully submitted,

LOUIS GRANICK
*Attorney for Petitioners*
2849 West 25th Street
Brooklyn 24, New York

## APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 283—October Term, 1960

(Argued February 20, 1961 Decided March 23, 1961)

Docket No. 26704

MAX MILLET and DORA MILLET,

*Plaintiffs-Appellants,*

—v.—

UNITED STATES OF AMERICA,

*Defendant-Appellee.*

Before:

HINCKS and MOORE, *Circuit Judges,* and
BRENNAN, *District Judge.**

Appeal from an order of the United States District Court for the Eastern District of New York, John R. Bartels, *Judge,* 189 F. Supp. 88, dismissing plaintiffs' complaint for failure to state a claim. Affirmed.

* Sitting by designation.

LOUIS GRANICK, Brooklyn, N. Y. *for Plaintiffs-Appellants,*

—37a—

RICHARD S. HARRELL, Asst. U. S. Atty., Eastern District of New York, Brooklyn, N. Y. (Cornelius W. Wickersham, Jr., U. S. Atty., E. D. N. Y. on the brief), *for Defendant-Appellee.*

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PER CURIAM:

Affirmed on the opinion below.

# UNITED STATES COURT OF APPEALS

## For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of March one thousand nine hundred and sixty-one.

Present:

Hon. Carroll C. Hincks,
Hon. Leonard P. Moore,
*Circuit Judge.*

Hon. Stephen W. Brennan,
*District Judge.*

Max Millet and Dora Millet,
*Plaintiffs-Appellants,*

—v.—

United States of America,
*Defendant-Appellee.*

Appeal from the United States District Court for the Eastern District of New York.

This cause come on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed, that the judgment of the said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
*Clerk*

United States Court of Appeals
Second Circuit
Filed March 23, 1961

A. DANIEL FUSARO, *Clerk*

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JAMES R. BROWNING, Clerk

No. 920

# In the Supreme Court of the United States

OCTOBER TERM; 1960

MAX MILLET AND DORA MILLET, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
*Solicitor General,*

WILLIAM H. ORRICK, JR.,
*Assistant Attorney General,*

MORTON HOLLANDER,
HERBERT E. MORRIS,
*Attorneys,*
*Department of Justice,*
*Washington 25, D. C.*

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| *United States* v. *Jones*, 131 U.S. 1 | 8 |
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**Statutes:**


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| Act of March 3, 1925, 43 Stat. 1105, 39 U.S.C. 12 (1952 ed.) | 2, 5, 10 |
| Act of September 2, 1960, Public Law 86-682, 74 Stat. 578, 39 U.S.C. 2102-2116 (Supp. II) | 2 |
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# In the Supreme Court of the United States

OCTOBER TERM, 1960

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No. 920

MAX MILLET AND DORA MILLET, PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the district court (R. 28a-32a) is reported at 189 F. Supp. 88.[1] The opinion of the Court of Appeals (Pet. App. 19-20) is reported at 287 F. 2d 409.

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[1] Since the Court of Appeals affirmed, *per curiam* on the opinion of the district court which is not set forth in the petitioners' appendix, we have reproduced the district court's opinion in Appendix B to this brief, pp. 13-17, *infra*.

## JURISDICTION

The judgment of the Court of Appeals was entered on March 23, 1961. The petition for a writ of certiorari was filed on April 24, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the Postmaster General had authority, prior to enactment of the Post Office Department Property Act of 1954, to enter into a lease to furnish space for post office use in a building to be constructed rather than in an existing structure.

## STATUTES INVOLVED

The pertinent provisions of the applicable statutes are set forth in Appendix A, pp. 10-12, *infra*.[2]

## STATEMENT

On January 16, 1953, the then owner of the petitioners' property, which, at that time, was a vacant parcel of land, submitted to the Post Office Department a "Proposal To Lease Quarters" (R. 2a-3a, 26a-28a). It provided for the leasing of a structure to be built on the parcel of land in accordance with the standard form of Post Office Department lease which was attached to the proposal (R. 2a-3a, 26a-28a).

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[2] On September 2, 1960, Public Law 86-682, 74 Stat. 578, was approved enacting a completely revised Title 39, The Postal Service. 39 U.S.C. (Supp. II). The provisions corresponding to Sections 11, 12, 791f and 901-909, applicable here, are now covered in the new title in Sections 2102-2116.

The lease was to run for a period of twenty years upon the completion of the building (R. 3a, 26a, 28a). The proposal to lease was accepted by the Post Office Department on April 21, 1953 (R. 2a-3a).

In January, 1954, after the proposed structure was erected, the previous owner and the Post Office Department executed a lease for the twenty-year period from January 15, 1954, to January 14, 1974 at an annual rental of $11,000 (R. 3a, 14a-16a). The Post Office Department has occupied the premises ever since (R. 3a, 29a). On April 20, 1955, the petitioners became the owners of the property, subject, of course, to the outstanding lease. (R. 12a-13a, 29a).

On July 12, 1960, the petitioners filed their complaint in the district court (R. 2a-4a). After setting forth the facts involved in the leasing arrangement, the petitioners alleged that prior to the passage of certain legislation on July 22, 1954, the Postmaster General lacked authority to enter into the lease agreement and that, as a consequence, the lease, being "in violation of 41 U.S.C.A. 11 * * * which statute prohibits such contract unless authorized by law", was "invalid and null and void" (R. 3a). Asserting violation of their Fifth Amendment rights by continuance of the allegedly invalid charge on their property, the petitioners demanded judgment annulling the lease instrument (R. 4a). Jurisdiction in the district court was invoked under the Tucker Act, 28 U.S.C. 1346 (a)(2), and under 28 U.S.C. 2410 (R. 2a).

The United States moved to dismiss the complaint for failure to state a claim upon which relief could

be granted (R. 7a-10a). The district court granted the motion, holding that the Postmaster General had authority prior to 1954 to lease the premises here involved (R. 28a-32a; App. B, *infra*). The court pointed to 1950 legislation, the Post Office Department Financial Control Act, 64 Stat. 462, 39 U.S.C. 794f (1952 ed.) (App. A, *infra*, p. 10), granting the Postmaster General authority to "enter into such leases of real property as may be necessary in the conduct of the affairs of the Department on such terms as he may deem appropriate * * * ". As to the Post Office Department Property Act of 1954, 68 Stat. 521, 39 U.S.C. 901-909 (1958 ed.) (App. A, *infra*, pp. 10-12), the court observed that this legislation did not, as the petitioners contended, grant for the first time the authority to enter into the lease here involved, but rather, in providing additional methods to the Postmaster General for acquiring property for post office use, merely reenacted the traditional leasing authority exercised in this case.

On appeal, the Court of Appeals affirmed, *per curiam*, on the opinion of the district court (Pet. App. 19-20).

## ARGUMENT

The decision of the lower courts is correct and does not warrant further review by this Court. The petitioners' argument is that while, at the time the lease here was executed, the Postmaster General had authority to lease for post office use quarters which were already in existence, he had no authority to lease quarters which a lessor was prepared to con-

struct. The argument is wholly untenable on its face and derives no support whatever from the applicable statutory provisions. Completely aside from the merits, moreover, the action was properly subject to dismissal in the district court for lack of jurisdiction.

1. a. The petitioners' argument is based on the premise that prior to passage of the Post Office Department Property Act of 1954, 68 Stat. 521, 39 U.S.C. 901-909, the Postmaster General had no statutory authority to enter into the agreements he made with the original lessor. These agreements consisted of an offer by the lessor in 1953 to lease quarters to the Post Office Department in a building the lessor was going to construct on its property (rather than in an existing structure), acceptance of the proposal at that time by the Post Office Department, and subsequent execution of the lease in 1954 upon completion of the building. The issue thus posed is whether Congress had conferred leasing authority on the Postmaster General prior to the agreement here executed, and, if so, whether it limited that authority to space in existing structures.

Considerably before the 1950 Act, relied on by the district court, Congress had given the Postmaster General the authority to lease quarters for post office use, limited only by a twenty-year term and certain conditions of rent payment. Act of April 24, 1920, 41 Stat. 578, 39 U.S.C. 11 (1952 ed.); Act of March 3, 1925, 43 Stat. 1105, 39 U.S.C. 12 (1952 ed.) (App. A, *infra*, p. 10). There was nothing in these provisions or anything else to suggest that the authority

conferred was restricted to leasing existing quarters.

As the district court observed, the 1950 Act also authorized the Postmaster General to enter into the agreements with the petitioners' predecessor in interest. It provided, in pertinent part, that the Postmaster General could "enter into such leases of real property as may be necessary in the conduct of the affairs of the Department on such terms as he may deem appropriate * * *". 39 U.S.C. 794f (1952 ed.) (App. A, *infra*, p. 10). The statute is clearly inconsistent with the petitioners' contention that the authority to lease was in some way limited to space in existing structures.

b. The petitioners misconceive the nature of the Post Office Department Property Act of 1954, 39 U.S.C. 901-909 (1958 ed.), when they assert that, in this legislation, Congress, for the first time, granted the authority to enter into the agreement executed here. The initial section of this Act, 39 U.S.C. 901 (App. A, *infra*, pp. 10-11), explaining the underlying purpose and intent, emphasized that this legislation was merely "to supplement existing provisions of law for the leasing of space for postal purposes * * *."

The Act accomplished this purpose by two principal methods. Under 39 U.S.C. 902, the Postmaster General was authorized, for the first time, to enter into lease-purchase agreements from ten to twenty-five years whereby, during the period of the leasehold or at its termination, the United States acquired title to the property involved. The second innovation, under 39 U.S.C. 903 (App. A, *infra*, p. 12), per-

mitted the Postmaster General to acquire property, by condemnation or otherwise, convey it to a lessor for the construction of a building for post office use and to lease the building, upon completion, for a thirty-year term. This is presumably the "build-and-lease agreement" referred to by the petitioner. Pet. pp. 10, 11-13. Neither of these methods, of course, was involved here. The fact that 39 U.S.C. 903(a)(1) (App. A, *infra*, p. 12) reenacts the government's leasing authority with regard to property owned or acquired by the lessor, rather than by the Post Office Department, in no way suggests that this particular authority is being granted for the first time.[3] As the pre-1954 legislation demonstrates, this is simply not so.

The legislative history of the 1954 Act lends no support to the petitioners' argument. As the Senate Committee on Public Works indicated, 39 U.S.C. 903 was no more than "an extension of the present leasing authority of the Postmaster General * * *." Sen. Rept. No. 1084, 83d Cong., 2d Sess., p. 4. And contrary to the petitioners' assertion (Pet. 11-13), the letter of former Postmaster General Summerfield to the Committee, when examined in its entirety, clearly emphasizes the new modes of government acquisition of property for construction of post offices provided by the bill, and does not state that the bill conferred authority for the first time to accept a proposal to

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[3] A very plausible basis for reasserting the leasing authority on property acquired by the lessor in 39 U.S.C. 903(a)(1) is the fact that the leasing term was extended in this section from twenty to thirty years.

lease quarters in a building to be constructed. *Id.* at pp. 11-12.[4]

2. Wholly apart from the foregoing considerations, review should be denied here for the additional and independent reason that the petitioners' action was subject to dismissal for lack of jurisdiction. In the complaint, the petitioners sought annulment of the lease, asserting jurisdiction under the Tucker Act, 28 U.S.C. 1346(a)(2), or alternatively, under 28 U.S.C. 2410, providing that the United States may be named a party in actions, in a court having jurisdiction of the subject matter, to quiet title to, or for the foreclosure of a mortgage or other lien on property on which the United States asserts a claim (R. 2a).

Jurisdiction here, however, did not exist under either of these statutes. The government's consent to be sued under the Tucker Act is limited to actions for a money judgment and incidental relief in equity in aid of such a judgment. *E.g.*, *United States* v. *Jones*, 131 U.S. 1, *Blanc* v. *United States*, 244 F. 2d 708 (C.A. 2), certiorari denied, 355 U.S. 874; *Clay* v. *United States*, 210 F. 2d 686 (C.A. D.C.), cer-

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[4] *Chase* v. *United States*, 155 U.S. 489, relied on by the petitioners (Pet. pp. 13-14), does not support their position since it dealt with the Postmaster General's authority to lease in 1870, long before the passage of the legislation authorizing the leasing of the property here involved. Nor does *Guerini Stone Co.* v. *Carlin*, 240 U.S. 264, help the petitioners. It merely holds that two related contracts must be construed together; neither the decisions of the courts below nor our position here depends upon a separation of the 1953 agreement and the 1954 lease.

tiorari denied, 347 U.S. 927. As to 28 U.S.C. 2410, it is firmly established that it provides no independent basis for jurisdiction. *E.g., Seattle Ass'n of Credit Men* v. *United States*, 240 F. 2d 906 (C.A. 9); *Wells* v. *Long*, 162 F. 2d 842 (C.A. 9).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY, 1961.

## APPENDIX A

39 U.S.C. 11 (1952 ed.) provides:

> The Postmaster General may, in the disbursement of the appropriation for rent, light, and fuel for first-, second-, and third-class post offices, apply a part thereof to the purpose of leasing premises for the use of post offices of the first, second, and third classes at a reasonable annual rental, to be paid quarterly for a term not exceeding twenty years.

39 U.S.C. 12 (1952 ed.) provides:

> The Postmaster General may make monthly payment of rental for post-office premises under lease.

39 U.S.C. 794f (1952 ed.) provides, in pertinent part:

> In the performance of, and with respect to, the functions, powers, and duties vested in him, the Postmaster General may—
>
> (1) enter into such leases of real property as may be necessary in the conduct of the affairs of the Department on such terms as he may deem appropriate, without regard to the provisions of any law, except those provisions of law specifically applicable to the Department; * * *.
>
> * * * *

39 U.S.C. 901-909 (1958 ed.) provide, in pertinent part:

> § 901.
>
> It is the purpose of this chapter to supplement existing provisions of law for the leasing of space for postal purposes by providing authorization for the acquisition by the Postmaster General of such space through the execution of lease-

purchase and other agreements under which the United States will obtain immediate use of such space and will make periodic payments, and in the case of lease-purchase agreements will obtain title to the property described therein at or prior to the end of the term prescribed therein. It is not the intention of the Congress that the program authorized by section 902 of this title shall constitute a substitute for or a replacement of any program for the construction by the United States of such structures as may be required from time to time by the postal service.

§ 902.

(a) Whenever the Postmaster General determines that (1) there is a substantial need for space for postal purposes in any particular area which cannot be satisfied by utilization of any existing property suitable for the purpose then owned by the Government, (2) the receipts of the post office serving such area exceed $10,000 per year, and (3) the best interests of the United States will be served by taking action hereunder, he is authorized to obtain and provide space for postal purposes in suitable structures of permanent-type construction in the several States, the District of Columbia, and the Territories and possessions of the United States (including Guam), by negotiating and entering into lease-purchase agreements, the terms of which shall not be less than ten nor more than twenty-five years and which shall provide in each case that title to the property shall vest in the United States at or before the expiration of the leasehold term and upon fulfillment of the terms and conditions stipulated in each of such lease-

purchase agreements. Such terms and conditions shall include provision for the application to the purchase price agreed upon therein of rental payments made thereunder. * * *.

* * * *

§ 903.

(a) The Postmaster General is authorized to—

(1) negotiate and enter into lease agreements with any person, copartnership, corporation, or other public or private entity, which do not bind the Government for periods exceeding thirty years for each such lease agreement, on such terms as the Postmaster General deems to be in the best interests of the United States, for the erection by such lessor of such buildings and improvements for postal purposes as the Postmaster General deems appropriate, on lands sold, leased, or otherwise disposed of by the Postmaster General to, or otherwise acquired by, such person, copartnership, corporation, or public or private entity;

(2) for the purposes of paragraph (1) of this section, and without regard to the Federal Property and Administrative Services Act of 1949—

(A) acquire by purchase, condemnation, lease, donation, or otherwise, and on such terms as he shall deem appropriate to the best interests of the United States, real property and interests therein, for use for postal purposes; * * *.

* * * *

## APPENDIX B

Opinion of the United States District Court for the Eastern District of New York.

[Caption Omitted]

BARTELS, District Judge.

Motion by defendant to dismiss the complaint pursuant to Rule 12(b)(6), Fed. Rules Civ. Proc., 28 U.S.C.A., for failure to state a claim upon which relief can be granted.

In January, 1953 the predecessor owner of plaintiffs' property (then a vacant parcel of land) entered into an agreement with the defendant acting through its Post Office Department, to lease the premises to the Government for a Post Office in accordance with the standard form of Post Office lease thereto attached, for a term of twenty years upon the completion of a building to be constructed thereon. In January, 1954, when the building was completed, the predecessor owner executed a lease with the Government pursuant to the Lease Proposal of January, 1953, and the Post Office Department has occupied the premises under that lease ever since.

In April, 1955 plaintiffs became the owners of the property subject to the lease, and in July, 1960 filed the complaint herein seeking to annul the lease upon the ground that the same is invalid and void because the execution thereof by the Government was unauthorized.

In effect, the complaint alleges that until July 22, 1954, when §§ 901 to 909 inclusive of Title 39 U.S.C.A.[1] were enacted, the Postmaster General was

[1] Now 39 U.S.C.A. §§ 2103-2116.

not authorized to execute an agreement for the construction and leasing of a permanent-type of structure and that accordingly the lease was executed in violation of 41 U.S.C.A. § 11, which was enacted in 1906 and provides:

> "No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the Departments of the Army, Navy, and Air Force, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year."

The Government asserts (i) that on January 16, 1953, the date of the Lease Proposal, and at all the times thereafter including January 28, 1954, the Postmaster General was authorized to enter into the lease pursuant to the Post Office Department Financial Control Act of 1950, 39 U.S.C.A. § 794f, which provided in part:

> "In the performance of, and with respect to, the functions, powers, and duties vested in him, the Postmaster General may—
>
> "(1) enter into such leases of real property as may be necessary in the conduct of the affairs of the Department on such terms as he may deem appropriate, without regard to the provisions of any law, except those provisions of law specifically applicable to the Department; * * *",

and (ii) that performance by the Post Office Department under the lease for more than six years after the enactment of the 1954 Act constituted ratification of the lease. This last contention can be disposed of by reference to Chase v. United States, C.C.Ind.1890,

44 F. 732, affirmed 155 U.S. 489, 15 S.Ct. 174, 39 L.Ed. 284, to the effect that if authority is lacking in the first instance, there is no ratification by subsequent occupation by the Post Office Department.

The essence of plaintiffs' argument is that the grant of express authority to enter into this type of lease by the 1954 Act automatically excluded the existence of prior authority for such lease in view of the prohibition contained in 41 U.S.C.A. § 11. Plaintiffs' contention that the 1950 Act is inapplicable is difficult to understand. In substance, they state that the 1950 Act provides for the improvement of Post Office Department accounting methods and procedures and grants authority to the Postmaster General to waive the existing general statutes on Government leases when he enters into leases of real property based on 39 U.S.C.A. They apparently claim that the Act imposes a limitation upon the authority of the Postmaster General without specifying how. Their argument appears, however, to be only another way of stating that the Postmaster General has the authority specifically granted to him under the 1950 Act to enter into such leases of real property as may be necessary in the conduct of the affairs of the Department "on such terms as he may deem appropriate, without regard to the provisions of any law" except those specifically applicable to the Department. The legislative purpose of the Act may be gleaned from the Senate Report concerning Section 794f which states that this section "gives the Postmaster General additional authority and freedom of action with respect to the leases of real property". S.Rep.No. 2217, 81st Cong., 2d Sess. (1950), U.S. Code Cong.Serv. 1950, Vol. 2, p. 3028. The wording of the 1950 Act would have little meaning unless

it were construed to grant the Postmaster General the authority to enter into the lease in question.

It is a *non sequitur* to argue that the express authority granted by the 1954 Act is a clear indication of the non-existence of prior authority under the 1950 Act. The purpose of the 1954 Act was to expand the authority already possessed by the Postmaster General and to expressly authorize him to execute lease-purchase agreements and purchase-lease agreements. In the grant of such broad authority the statute in its general language necessarily authorized as an incident thereto, leases of the type herein involved. From such language it does not follow, however, that no authority existed prior thereto for the execution of the present lease. Section 901, 39 U.S.C.A.[2] stated in part:

> "It is the purpose of this title to *supplement* existing provisions of law for the leasing of space for postal purposes by providing authorization for the acquisition by the Postmaster General of such space through the execution of lease-purchase and *other agreements* under which the United States will obtain immediate use of such space and will make periodic payments. * * *" (Emphasis added).

Thus the authority granted under the 1954 Act supplements and expands the authority granted under the 1950 Act by giving the Postmaster General authority to enter into the leases set forth in Sections 901 to 909 inclusive. The lease involved in this case is not a lease-purchase nor a purchase-lease agreement but simply a term lease, which while authorized under the 1954 Act, was also authorized under the

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[2] Now 39 U.S.C.A. § 2115.

1950 Act. Under this construction 41 U.S.C.A. § 11 has not been violated because the lease agreement was "authorized by law" and one need not inquire whether the appropriation was "adequate to its fulfillment". The above construction also accords with the wording of the various Acts above mentioned, the Congressional intent and the conditions which the various Acts purported to obviate. There is no merit in plaintiffs' complaint and it therefore must be dismissed.

Settle order within ten (10) days on two (2) days' notice.

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Supreme Court of the United States

REPLY OF THE PETITIONERS TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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IN THE

# Supreme Court of the United States

October Term, 1960

No. 920

MAX MILLET and DORA MILLET,

*Petitioners,*

—v.—

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY OF THE PETITIONERS TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

### Statement

Petitioners' Certiorari Petition sets forth the Opinion Below (p. 1), Jurisdiction (p. 2), Questions Presented (pp. 2-3), The Statutes (pp. 3-5), Statement of the Case (pp. 5-6), Arguments (pp. 6-16).

As to the merits of the question presented in the Opposition Brief, they advocate the novel doctrine that acts of the Postmaster General unauthorized by any statute cannot be questioned or reviewed by this Court.

They are answered fully in the Petitioners' Certiorari Petition (pp. 6-16).

The Opposition Brief (pp. 8-9) raises the issue of jurisdiction without merit.

Petitioners' Certiorari Petition (p. 2) states that the jurisdictional basis of the District Court is founded on the Tucker Act, 28 U. S. C., Section 1346(a)(2) (1958 Ed.), Quiet Title Statute, 28 U. S. C., Section 2410 (1958 Ed.), Postal Service Statute, 28 U. S. C., Section 1339 (1958 Ed.) and Due Process provision, 5th Amendment, United States Constitution.

Petitioners' complaint (R. 2a-4a) states in the jurisdictional allegation that jurisdiction of the District Court is founded on Quiet Title Statute, 28 U. S. C., Section 2410 (1958 Ed.) and Tucker Act, 28 U. S. C., Section 1346(a)(2) (1958 Ed.) citing Public Contracts Act 1906, 41 U. S. C., Section 11 (1958 Ed.) (R. 3a) and Due Process, 5th Amendment, United States Constitution (R. 4a) as the federal statute and constitutional claim.

## ARGUMENT

### POINT I

**The Court has jurisdiction of this suit under the Tucker Act, 28 U. S. C., Section 1346(a)(2).**

Under the Tucker Act, the District Court has original jurisdiction of any civil suit where the amount claimed does not exceed $10,000.00 and is based on the Constitution or any act of Congress. The complaint alleges as jurisdiction the Constitution and the federal statute. It cites the due process provision of the Fifth Amendment and the Quiet Title Act, 28 U. S. C., Section 2410 [1958 Ed.].

No amount is claimed in the prayer for relief. This does not exceed the jurisdictional amount and may be amended, if needed, under Title 28 U. S. C., Section 1653 (1958 Ed.) even in this Court.

Further, under Rule 8a F. R. C. P. and Rule 54c F. R. C. P., the proper relief may be granted even if not asked

for in the prayer for relief. The existence of a void and invalid lease instrument filed on the title to the subject property as alleged in the complaint entitles Petitioners to nominal as well as real damages.

The lease instrument filed on the real property violates the Petitioners' property rights under the Fifth Amendment Due Process provision, U. S. Constitution, Amendment 5. It forbids deprivation of property rights without due process of law. In this case, there is no law which authorized the lease instrument. This void instrument filed against the Petitioners' property is a cloud on Petitioners' title, *Humble Oil & Refining Co.* v. *Sun Oil Co.*, U. S. C. A. 5th Cir. 1951, 191 F(2d) 705, 718 and deprives them of their property rights without due process of law as it sits on Petitioners' title without legitimate existence.

While there is no decided case of record in which it has been held that a filed void lease violates due process under the 5th Amendment, such fact of itself makes the violation evident.

The illegal act, even of the Government agent, can be removed by legal means.

While there is no decided case on all fours, in *U. S.* v. *Certain Lands at Great Neck etc.*, D. C. E. D. N. Y. 1943, 49 F. Supp. 265, the Court held there was a violation of the 5th Amendment where the property owners' contract right to an easement to use a common road was extinguished. The violation of the 5th Amendment is even more evident where the property owners' title to his own land is beclouded and encumbered with a void and invalid lease—void and invalid because it came into existence without authority of law.

*Bell* v. *Hood*, 1946, 327 U. S. 678, 682 indicates that the District Court has jurisdiction under the Tucker Act, 28

U. S. C., Section 1346(a)(2) where the claim is based on the Constitution under the 4th and 5th Amendments. *Fielding* v. *Allen*, U. S. C. A. 2nd Cir. 1950, 181 F(2d) 163, 166, citing *Bell* v. *Hood, supra*, stated that a substantial claim under a federal statute presents a case within the jurisdiction of the federal courts [applicable under Tucker Act, 28 U. S. C., Section 1346(a)(2)] and that the statute on which claim is based need not expressly provide for remedy by way of suit. Quiet Title Statute, 28 U. S. C., Section 2410 gives consent to such suit against the United States and falls within the rule enunciated in *Fielding* v. *Allen*.

In either event, the case at bar relies on the 5th Amendment or Quiet Title Statute for jurisdiction and falls squarely within the rule of *Bell* v. *Hood* and *Fielding* v. *Allen*.

## POINT II

**The Court has jurisdiction of this suit under other laws.**

The District Court has original jurisdiction of any civil suit under any law of Congress relating to the Postal Service, 28 U. S. C., Section 1339 (1958 Ed.). The two statutes cited at page 4 of Petitioners' Certiorari Petition, 1950 Post Office Department Financial Control Act and 1954 Post Office Department Property Act are part of Title 39 U. S. C., Postal Service Law and they are the basis of the claim on which the lease instrument and the lease-construction agreement are invalid.

Under the above statute, the amount of claim is not material to jurisdiction. *Fite* v. *Payne*, D. C. N. D. Texas 1950, 91 F. Supp. 21 and *Griffith* v. *Vick Grocery Co.*, C. C. A. 6th Cir. 1921, 272 F. 246.

Quiet Title Statute 28 U. S. C., Section 2410 in the case at bar involves a Post Office Department lease and in this respect "relates" to the Postal Service within 28 U. S. C., Section 1339.

## POINT III

**The complaint is not dismissable for any alleged jurisdictional defective averment or prayer.**

Aside from the Rules and Statute cited in Point I, *supra*, the decisions do not favor dismissal on this score but favor correction by the Court, if needed, and a ruling on the merits. *Nagler* v. *Admiral Corp.*, U. S. C. A. 2nd Cir. 1957, 248 F(2d) 319; *Dioguardi* v. *Durning*, U. S. C. A. 2nd Cir. 1944, 139 F(2d) 774; *Keiser* v. *Walsh*, U. S. C. A., D. C. 1941, 118 F(2d) 13; *Rank* v. *Krug*, U. S. D. C., N. D. Cal. 1950, 90 F. Supp. 773.

## POINT IV

**The petitioners are entitled to equitable relief of the Court.**

Quiet Title Statute is at least a consent to suit by the United States. Consent to suit is a consent to relief under the statute. As the object of quiet title suit is equitable relief of the Court to remove cloud on title and the Court has general jurisdiction at law and equity to remove the cloud cast by a void and invalid lease, *Humble Oil & Refining Co.* v. *Sun Oil Co.*, U. S. C. A. 5th Cir. 1951, 191 F(2d) 705, page 718, the point made in Opposition Brief, *supra*, is without any merit since the consent to suit under Quiet Title Statute, *supra*, puts the Government in the status of any other litigant before the Court.

## CONCLUSION

**For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.**

May 1961.

Respectfully submitted,

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